

# Independent Human Rights Act Review

## Response to call for evidence from the Baring Foundation

This is a response to the call for evidence issued by the Independent Human Rights Act Review for and on behalf of the Baring Foundation, a company limited by guarantee registered in England (No 950696) and registered as a charity in England and Wales (No 258583).

We are an independent foundation which protects and advances human rights and promotes inclusion. We believe in the role of a strong, independent civil society nationally and internationally. We use our resources to enable civil society to work with people experiencing discrimination and disadvantage and to act strategically to tackle the root causes of injustice and inequality.

This submission was originally prepared in response to the call for evidence as part of the inquiry into the IHRAR by the Joint Committee on Human Rights (the Inquiry). As such, its content is not framed in response to the IHRAR's specific questions. However, the examples cited below provide practical examples of the positive impact of the current operation of the Human Rights Act (HRA) and evidence of its crucial role as a tool for civil society to address issues of discrimination and disadvantage. We hope this is of benefit to the panel members.

We seek to engage with the questions from the Inquiry as an independent grantmaking foundation that works with civil society organisations in all four nations of the United Kingdom. Through our Strengthening Civil Society programme we support work which involves using the law and human rights based approaches as tools to achieve change for individuals and communities facing discrimination and disadvantage. We address the first three questions from the Inquiry as these relate most directly to the diverse experience of the organisations we fund (grantees).

### Has the Human Rights Act led to individuals being more able to enforce their human rights in the UK?

The HRA has been successful in 'bringing rights home'. It has been significantly beneficial in enabling people to bring cases alleging that their human rights have been violated to the domestic courts and to get a remedy if appropriate. This is a much more responsive process than the position prior to the

#### ***Case studies from grantees***

The Public Interest Law Centre brought a case under the HRA challenging student loan regulations which discriminated against migrant victims of domestic violence and abuse. The education regulations now take account of victims of domestic violence in deciding eligibility for student loans. *QA v Secretary of State for Education* [2020] EWHC 276 (Admin).

The Public Law Project was successful in bringing a case on behalf of a client on the basis that the rules governing Personal Independence Payments were unlawful and discriminated against people with mental health impairments in breach of the HRA. *RF V Secretary of State for Department of Work and Pensions* [2017] EWHC 3375 (Admin).

Child Poverty Action Group brought a case under the HRA that enabled two British children with significant disabilities to claim disability living allowance after they were initially refused because they did not meet the requirement for them to have been in the UK for two years before claiming. *EK v SSWP: TS v SSWP* [2020] UKUT 284.

HRA coming into force when individuals had to take the UK to the European Court of Human Rights (ECtHR). This was a cumbersome process that usually took many years.

Arguably the most significant impact of the HRA has been beyond the courtroom. It has directly influenced the way public authorities make decisions as Section 6 requires public authorities to act in a way that is compatible with the rights set out in the HRA (Convention rights). When this happens, people do not have to enforce their rights as such, as they are already taken account of in the way decisions are reached and made. Rather it allows for their rights to be better understood, protected and asserted without the need to resort to litigation. This development of a culture of rights has been growing slowly but surely over the past two decades and is helping to develop rights compliant practice on the part of public authorities.

#### ***Case studies from grantees***

In the early stages of the Covid-19 pandemic, Access Social Care worked with others to influence decision makers at NICE, using human rights arguments, to amend their guidelines for critical care clinicians to help them to decide who to treat should they need to ration health services. The guidelines contained a reference to the frailty scale which was designed to be used with the over 65s. If applied to working age disabled people, it would have prevented them from accessing care. The guidelines were duly amended.

In 2015-2019 the Scottish Human Rights Commission worked with residents living in poor housing conditions in Leith to secure improvement in their housing by adopting a human rights based approach. The distinctive power of using human rights to achieve change was strongly felt by residents who saw the project as key to unlocking action by the local authority.

#### **How easy or difficult is it for different people to enforce their human rights?**

The difficulties in people enforcing their rights relates not to the HRA itself but to the general lack of access to justice. The reduction in legal aid provision and lack of confidence in the Exceptional Case Funding scheme, introduced to offer a safety net to ensure that legal aid would be available where the human rights of individuals would otherwise be breached, are significant factors.

Another problem is the lack of information available to individuals, advocacy and support groups and public authorities about the rights contained in the HRA – what they mean and how they apply in practice. When the HRA was introduced there was little education or training made available. This has led to people failing to assert or enforce their rights when it would be appropriate to do so. The Baring Foundation Strengthening Civil Society programme aims to help to address that gap through skilling up civil society to make use of human rights to address the discrimination and disadvantage faced by their beneficiaries.

***Case study from a grantee***

The Mother and Child project is a joint initiative by the Foundation for Families and the Central England Law Centre. It focussed on 'looked after'/care leaver girls and young women who are mothers or mothers-to-be and at risk of losing their own children to the care system. Training advocates in a human rights based approach improved their knowledge base to enable them to support clients in successfully claiming their rights. It also provided a driver to wider systemic change on the part of public bodies including the potential to influence the commissioning of services for the better.

Low levels of awareness also mean human rights do not always inform the development of policy or decision making on the part of public authorities even when directly relevant. There is still some way to go to ensure human rights fully and appropriately inform the way public authorities operate.

***Case study from grantees***

Access Social Care used human rights arguments to challenge the practice of people with learning disabilities being issued with Do Not Resuscitate Orders, without their consent of that of family members, during the first wave of the Covid-19 pandemic. However, during the second wave of the pandemic there are reports that people with learning disabilities are still being subject to this widely condemned practice.

The Children's Law Centre in Northern Ireland used human rights arguments in assisting a disabled child to access physiotherapy in education, without which she has insufficient oxygen going to her brain to enable her to achieve to her full potential.

**How has the operation of the Human Rights Act made a difference in practice for public authorities? Has this change been for the better or worse?**

Many public authorities have engaged with the HRA as a tool to develop better, person centred, rights compliant policy and practice. This is undoubtedly a change for the better.

***Case study from a grantee***

Research undertaken by Kinship Carers (kinship care involves families or friends taking on the care of the child of another) highlights the collaborative nature of human rights which enables local groups and public authorities to solve problems together and help identify common ground.

**What has been the impact of the HRA on the relationship between the Courts, Government and Parliament?**

Section 3 of HRA requires primary and subordinate legislation to be interpreted compatibly with the rights in the HRA so far as it is possible to do so. Where this is not possible the HRA was carefully crafted so as not to constrain parliamentary sovereignty and nor has it done so in practice. In such a scenario Section 4 requires the court to make a declaration of incompatibility. It does not require Parliament to change the law – it flags up the issue for Parliament to decide.

***Case study from a grantee***

The Child Poverty Action Group used human rights arguments to successfully challenge the injustice faced by bereaved families who were unable to claim bereavement support payments at the same level as other families because of the requirement for couples to be married or in a civil partnership. A declaration of incompatibility was made by the High Court under Section 4 of HRA. The Government announced in July 2020 that it would bring forward legislation to rectify this. *R (Jackson and others) v SSWP* [2020] EWHC 183.

For any questions in relation to this submission please contact [baring.foundation@ing.com](mailto:baring.foundation@ing.com).

**The Baring Foundation**

**18 February 2021**